Supreme Court, U.S.
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No.

IN THE

Supreme Court Of The United States

OCTOBER 1996 TERM

ROBERT J. LOEW AND DARREL L. MATTESON,

Petitioners,

v.

DEAN HIBBARD AND H.D. GARRISON,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF COLORADO

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30 pp

QUESTIONS PRESENTED

1. Whether the Colorado Supreme Court departed from this Court's instruction that substantive due process should not be used as a catch-all remedy for allegedly egregious public official conduct where a more specific constitutional protection exists.

2. Whether the Colorado Supreme Court departed from this Court's rule that an allegedly random and unauthorized deprivation of property does not violate the procedural protections of the due process clause if an adequate and meaningful post-deprivation remedy exists for the loss of that property.

LIST OF PARTIES TO THE PROCEEDING

1. County of Adams, State of Colorado
2. Robert J. Loew and Darrell L. Matteson, petitioners
3. Dean Hibbard and H.D. Garrison, respondents

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	1
STATEMENT OF RELATED CASES	5
REASONS FOR GRANTING THE WRIT	5
I. THE COLORADO SUPREME COURT ERRED IN APPLYING SUBSTANTIVE DUE PROCESS ANALYSIS INSTEAD OF THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT	5
II. THE COLORADO SUPREME COURT ERRED IN REACHING AND RESOLVING THE MERITS OF THE PLAINTIFFS' PROCEDURAL DUE PROCESS CLAIM	14
A. THE COLORADO SUPREME COURT ERRED IN APPLYING PROCEDURAL DUE PROCESS ANALYSIS INSTEAD OF THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT	14
B. PROCEDURAL DUE PROCESS WAS SATISFIED BY THE POST-DEPRIVATION PROCEDURES AVAILABLE UNDER COLORADO LAW	15
CONCLUSION	21

TABLE OF AUTHORITIES

Cases	PAGE
Albright v. Oliver, 114 S. Ct. 807 (1994)	6,7
Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996)	8
Baker v. McCollan, 443 U.S. 137 (1979)	6
Bateman v. City of West Bountiful, 89 F.3d 704 (10th Cir. 1996)	8
Cathey v. Guenther, 47 F.3d 162 (5th Cir. 1995)	18
Collins v. Harker Heights, Tex., 503 U.S. 115 (1992)	6
County of Adams v. Hibbard, 918 P.2d 212 (Colo. 1996)	1,4,11,12,15,19
Crooked Lake Development, Inc. v. Emmet County, 763 F.Supp. 1398 (W.D. Mich. 1991)	8
DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell, 53 F.3d 592 (3rd Cir. 1995), *cert. denied,* 116 S. Ct. 352 (1995)	9
Doherty v. City of Chicago, 75 F.3d 318 (7th Cir. 1996)	10
Dolan v. City of Tigard, 114 S. Ct. 2309 (1994)	10
Geld Group v. Koby, 63 F.3d 1528 (10th Cir. 1995)	9
Graham v. Conner, 490 U.S. 386 (1989)	6,7

	PAGE
Hibbard v. County of Adams, 900 P.2d 1254 (Colo. App. 1994)	1,12
Hibbard v. County of Adams, No. 89CV2876 (D. Ct. Adams County Apr. 14, 1992)	13
Holmes v. California Army National Guard, 920 F. Supp. 1510 (N.D.Cal. 1996)	9
Hudson v. Palmer, 468 U.S. 517 (1984)	15,16,19
Kaluczky v. City of White Plains, 57 F.3d 202 (2d Cir. 1995)	9
Licari v. Ferruzzi, 22 F.3d 344 (1st Cir. 1994)	10,18
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	15,16,19,20
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)	11
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)	11
Martinez v. State of California, 444 U.S. 277 (1980)	6
Miller v. Campbell County, 945 F.2d 348 (10th Cir. 1991)	8
Milne v. Township of Oregon, 777 F.Supp. 536 (E.D. Mich. 1991)	8
Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961)	12
Moore v. City of East Cleveland, 431 U.S. 494 (1977)	6,7
Nestor Colon Median & Secesores, Inc. v. Custodio, 964 F.2d 32 (1st Cir. 1992)	9

PAGE

Ossman v. Mountain States Telephone and Telegraph Co.,
184 Colo. 360, 520 P.2d 738 (Colo. 1974) 11,20

Parratt v. Taylor,
451 U.S. 527 (1981) 15,16,17,18,20

Pearson v. City of Grand Blanc,
756 F. Supp. 314 (E.D. Mich. 1991),
affd on other grounds, 961 F.2d 1211 (6th Cir. 1992) 8

Pembaur v. City of Cincinnati,
475 U.S. 469 (1986) 4

Planned Parenthood v. Casey,
505 U.S. 833 (1992) 6

Rockler v. Minneapolis Community Development Agency,
866 F. Supp. 415 (D. Minn. 1994) 8

Roosevelt Elementary Sch. Dist. No.66 v. Bishop,
877 P.2d 806 (Ariz. 1994) 9

State, Dept. of Health v. The Mill,
809 P.2d 434 (Colo. 1991) 11,20

United States v. Edmonds,
80 F.3d 810, 833 (3rd Cir. 1996)
filed, 65 U.S.L.W. 3034 (U.S. July 3, 1996); 9

Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,
473 U.S. 172, 194-97 (1985), ... 10,11,14,17

Yates v. Jamison,
782 F.2d 1182 (4th Cir. 1986) 18

Zinermon v. Burch,
494 U.S. 113 (1990) 15,17,18

	PAGE
Statutes	
§ 30-15-401, C.R.S.	1
§ 30-15-401(1)(a), C.R.S	3
28 U.S.C. § 1257	1
42 U.S.C. § 1983	1,2,3,4,5,6,7,9,12, 13,17,19,20,21
42 U.S.C. § 1988	4
Colo. Const. art II, § 15	11,20

OPINIONS BELOW

The decision of the Colorado Supreme Court has been published at 918 P.2d 212 (Colo. 1996). The decision of the Colorado Court of Appeals has been published at 900 P.2d 1254 (Colo. App. 1994).

JURISDICTION

The judgment of the Colorado Supreme Court was entered on June 17, 1996. This Court has jurisdiction to entertain this petition for certiorari pursuant to the provisions of 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves 42 U.S.C. § 1983:

Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In 1988, the County of Adams, Colorado ("the County") adopted Ordinance No. 3 pursuant to § 30-15-401, et seq., C.R.S. This Ordinance was adopted for the purpose of preventing environmental blight. Failure of a property owner to comply with

Ordinance 3 subjects the owner to enforcement proceedings. In the event of an Ordinance violation, a notice is given to the property owner, and the property must be brought into compliance. In the event of non-compliance, a hearing is conducted, and an administrative law judge ("ALJ") determines whether causes of blight exist, and, if they do, the ALJ issues an order compelling the property owner to remove the causes of the blight.

In October 1989, plaintiff Hibbard received notice from the County Attorneys' Office that a zoning inspector had determined his property violated Ordinance 3 in certain particulars, including the presence of "out-buildings" and "vacant dwellings" determined by the inspector to be blighting factors. Hibbard did not remove the blight factors and a hearing was conducted before an ALJ. At this hearing, Mr. Hibbard represented himself, and the County was represented by defendant Matteson.

After the hearing, the ALJ determined the existence of numerous violations of Ordinance 3, including the presence of "a building which is vacant and was the subject of a fire in 1983" and "old and unsightly out-buildings." The order directed Hibbard to remove the offending materials and buildings by a specified date, and, in the event of noncompliance with the ALJ's order, directed that the County could enter the premises and perform the cleanup of the property.

Hibbard failed to comply with the ALJ's order and the County subsequently removed the offending materials and buildings.

Plaintiffs then instituted this action. Plaintiffs sought a declaratory judgment that Ordinance No. 3 was invalid and/or unconstitutional to the extent it permitted the County to destroy buildings considered to be a blighting factor. Plaintiffs also sought damages against defendants in their official capacities under 42 U.S.C. § 1983 because of the destruction of the second building, items of personalty within that building, and for damage to an underground tank, pump, and well.

After trial to the court, the court issued a written order and judgment. The court upheld the validity and constitutionality of Ordinance No. 3. However, the court determined that the ALJ's order did not authorize destruction of the second building or the removal of the personal property within it. The court rejected defendants' contention that plaintiffs could not maintain a § 1983 action because they had failed to exhaust state remedies, including inverse condemnation. The court therefore concluded that plaintiffs' property was taken without just compensation, and awarded Hibbard $10,000 for the destruction of his second building and Garrison $3,500.00 for the personal property destroyed in the second building. The court concluded that plaintiffs " . . . have shown no different damages under 42 U.S.C. § 1983 than those proven under a condemnation theory . . . ".

The Court of Appeals affirmed in part and reversed in part. The Court held that Ordinance No. 3 was invalid to the extent it purported to authorize the destruction of any building through administrative proceedings. This conclusion was reached under Colorado's county powers statute on grounds unrelated to any federal constitutional infirmity. The Court of Appeals reasoned that § 30-15-401(1)(a), C.R.S. only authorized the removal of rubbish, including trash, junk, and garbage, but not buildings. The Court held that the County was liable under 42 U.S.C. § 1983 because Ordinance No. 3 constituted a "policy" which resulted in a "taking" of plaintiffs' property without compensation.

The Court of Appeals also held the County liable because of the individual county attorneys' interpretation of the ALJ's order as including the second building. The Court reasoned that their decision also constituted a "policy" resulting in an unconstitutional "taking" for which the County was liable. The Court of Appeals held that the individual defendants did not enjoy qualified immunity for destruction of the second building because one of them "knew" that the order did not cover it.

However, the Court also determined that the individual defendants did enjoy qualified immunity for any damage to the fire damaged building since it was not clearly established that Ordinance No. 3 was "partially invalid."

The Court of Appeals also determined that the trial court erred in refusing to enter any award for damage to the underground tank, pump, and well if such damages resulted from the destruction of the fire damaged building because its destruction occurred as a result of the County's "invalid" Ordinance. The Court determined that only the County, and not the individual defendants, would be liable for such destruction. Finally, the Court remanded for redetermination of attorney fees under 42 U.S.C. § 1988.

The Colorado Supreme Court granted certiorari with respect to the following two issues:

1. Whether the Court of Appeals erred in holding the County liable for destruction of property under 42 U.S.C. § 1983.

2. Whether the Court of Appeals erred in holding the County attorneys liable for destruction of property under 42 U.S.C. § 1983.

The Colorado Supreme Court first held that the Court of Appeals erred in holding the County liable under 42 U.S.C. § 1983. The Court reasoned that the two individual county attorneys were not "policymakers" as a matter of law. In reaching its conclusion, the Colorado Supreme Court applied the test for determining whether a municipal employee is a "policymaker" for purposes of liability under 42 U.S.C. § 1983 articulated by this Court in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); *County of Adams v. Hibbard*, 918 P.2d 212, 216-220 (Colo. 1996).

The Colorado Supreme Court then held that the individual county attorneys were liable under 42 U.S.C. § 1983. 918 P.2d at 220-221. The Court held that the county attorneys deprived plaintiffs of their procedural and substantive due process rights by causing the destruction of their property. 918 P.2d at 221.

Justice Mullarkey, with whom Justice Kourlis joined, concurred and dissented. 918 P.2d at 221-225. Justice Mullarkey noted numerous procedural and factual problems with the majority's reasoning and ultimately concluded:

> . . . I would conclude that the plaintiffs have not proven a constitutional tort. It may be that the plaintiffs can pursue common law torts such as trespass or conversion against the individual defendants, but, in my view, they have no claim against these defendants under 42 U.S.C. § 1983.

918 P.2d at 225.

STATEMENT OF RELATED CASES

There are no related cases.

REASONS FOR GRANTING THE WRIT

I. THE COLORADO SUPREME COURT ERRED IN APPLYING SUBSTANTIVE DUE PROCESS ANALYSIS INSTEAD OF THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT.

The Colorado Supreme Court improperly utilized the substantive component of the Fourteenth Amendment's Due Process Clause as a catch-all provision for allegedly egregious governmental conduct rather than utilizing the Fifth Amendment's Just Compensation Clause as the explicit textual source of constitutional protection germane to the plaintiffs' claim. In so doing, the Colorado Supreme Court's decision failed to heed this Court's rule that a plaintiff's constitutional claim must be analyzed under a specific constitutional provision when one is readily applicable instead of substantive due process. The Colorado Supreme Court's error warrants this Court's review to clarify the interplay between the Just Compensation Clause of the

Fifth Amendment and the substantive due process protections of the Fourteenth Amendment in land-use regulation disputes.

First, the Colorado Supreme Court's decision omitted the critical initial step in analyzing any § 1983 claim, identifying the specific constitutional right allegedly infringed. *Albright v. Oliver,* 114 S. Ct. 807, 811 (1994); *Graham v. Conner,* 490 U.S. 386, 394 (1989); *Martinez v. State of California,* 444 U.S. 277, 284 (1980); *Baker v. McCollan,* 443 U.S. 137, 140 (1979). Instead, the Colorado Supreme Court recast the plaintiffs' claims in substantive due process terms without critical examination when even a cursory review of the nature of the plaintiffs' claim would have revealed its genesis as a government taking without just compensation. The plaintiffs allege the County and the individual defendants improperly and unreasonably destroyed their property by razing it pursuant to the County's blight removal ordinance and the ALJ's order. In alleging government actions destroyed, or completely interfered with their use of their property, the plaintiffs' allegations present a classic "takings" scenario properly analyzed under the Just Compensation Clause of the Fifth Amendment.

The necessity of identifying the specific constitutional provision at issue is doubly important in cases raising substantive due process claims because of the pervasive difficulty in crafting concrete standards for judicial application in this area. *Collins v. Harker Heights, Tex.,* 503 U.S. 115, 125 (1992). In *Moore v. City of East Cleveland,* 431 U.S. 494 (1977), the Court recognized the area of substantive due process, "has been at times a treacherous field for this Court." *Id.* at 502. As a direct result of past experience, "the Court has been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins,* 503 U.S. at 125. In the post-*Lochner* era, the Court has carefully circumscribed substantive due process protections to, "a realm of personal liberty where the government may not enter." *Planned Parenthood v. Casey,* 505 U.S. 833, 847 (1992).

This sacrosanct personal sphere free from governmental meddling includes individual and personal decisions concerning marriage, procreation, contraception, family relationships, child rearing, and one's own bodily integrity. *Id.* at 85 (discussing and collecting cases). The Court has expressed an extreme reluctance to expand substantive due process into additional areas.

As a result of these concerns, the Court has limited the applicability of general substantive due process protections when a more specific constitutional right applies. This thesis or theme of the Court's precedents has been present at least since *Moore,* where the Court candidly acknowledged, "[t]here are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights." *Moore,* 431 U.S. at 502. In *Graham,* the Court's long-standing concerns crystallized into a rule of law. There, the Court held § 1983 claims of excessive force must be advanced and analyzed under either the Fourth or Eighth Amendment, instead of substantive due process. *Graham,* 490 U.S. at 394-95. "The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized 'excessive force' standard." *Id.* at 394 (citing *Tennessee v. Garner,* 471 U.S. 1, 7-22 (1985) and *Whitley v. Albers,* 475 U.S. 312, 318-326 (1986)). Following *Graham,* in *Albright,* the Court both further clarified and generalized the emerging rule of constitutional law. "Where a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Albright,* 114 S. Ct. at 813 (quoting *Graham,* 490 U.S. at 395). While this rule stems from a longstanding jurisprudential concern animating much of this Court's substantive due process discourse, the specific articulation of the rule has occurred in the context of the Fourth and Eighth Amendments. The question presented in the instant petition is whether the general recognition in these cases of the necessity of focusing on the most specific constitutional standard available should also apply in the

context of the Just Compensation Clause of the Fifth Amendment and in land use regulation.

Importantly, however, this petition does not ask this Court to expound on these constitutional principles on a tabula rasa. In addition to this Court's precedents discussing the interplay between substantive due process analysis and the specific guarantees of the Bill of Rights described above, two United States Courts of Appeal have concluded the Just Compensation Clause of the Fifth Amendment was an explicit textual source of protection precluding additional relief under a substantive due process theory. In *Bateman v. City of West Bountiful*, 89 F.3d 704 (10th Cir. 1996), following several of its earlier precedents, the Tenth Circuit "held that the ripeness requirement of *Williamson* [473 U.S. 172 (1985)] applies to due process and equal protection claims that rest upon the same facts as a concomitant takings claim." *Id.* at 709. The court reasoned, "we are reluctant in the context of a factual situation that falls squarely within [the Takings Clause] to impose new and potentially inconsistent obligations upon the parties under the substantive or procedural components of the Due Process Clause." *Id.* (quoting *Miller v Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991)). Similarly, in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc), the Ninth Circuit held the Fifth Amendment provided an explicit textual source of constitutional protection, thus preempting the plaintiffs' claim based on the more generalized notion of substantive due process. *Id.* at 1324. In addition to these two decisions, several federal district courts have also applied the *Albright* rule in the takings context. *See Rockler v. Minneapolis Community Development Agency*, 866 F. Supp. 415, 420 (D. Minn. 1994); *Milne v. Township of Oregon*, 777 F.Supp. 536, 537 (E.D. Mich. 1991); *Crooked Lake Development, Inc. v. Emmet County*, 763 F.Supp. 1398, 1404 (W.D. Mich. 1991); *Pearson v. City of Grand Blanc*, 756 F. Supp. 314, 317 (E.D. Mich. 1991), *aff'd on other grounds*, 961 F.2d 1211 (6th Cir. 1992). The Colorado Supreme Court's application of general substantive due process principles without identifying the Just Compensation Clause as the explicit textual source of the applicable constitutional standard directly

conflicts with the decisions of these federal courts.[1] More significantly, the decision challenged here creates a generic § 1983 claim for allegedly flagrant governmental conduct in any area of public entity action.

In contrast, several other Circuit Courts of Appeal continue to apply substantive due process analysis in as-applied land-use regulation and zoning disputes. For example, in *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592 (3rd Cir. 1995), *cert. denied*, 116 S. Ct. 352 (1995), the Third Circuit analyzed a challenge to the denial of a use variance by the Board in substantive due process terms. The court concluded, "in the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached." *Id.* at 601. Similarly, the Seventh Circuit has "recognized the potential for a substantive due process claim in the context of land-use decisions that are arbitrary and unreasonable, bearing no substantial relationship to

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[1] Further, a variety of other courts have also applied this general rule outside the specific context from where it originated. *See e.g., United States v. Edmonds*, 80 F.3d 810, 833 and n. 6 (3rd Cir. 1996) (Alito, J., concurring in part and dissenting in part) (Sixth Amendment); *pet. for cert. filed, 65 U.S.L.W. 3034 (U.S. July 3, 1996) (No. 96-25); Geld Group v. Koby*, 63 F.3d 1528, 1539 (10th Cir. 1995) (First Amendment and Equal Protection Clause); *Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995) (First Amendment); *Nestor Colan Median & Secesores, Inc. v. Custodio*, 964 F.2d 32, 46 (1st Cir. 1992) (First Amendment); *Holmes v. California Army National Guard*, 920 F. Supp. 1510, 1536 (N.D. Cal. 1996) (First Amendment and Equal Protection Clause); *Roosevelt Elementary Sch, Dist. No 66 v. Bishop*, 877 P.2d 806, 811 (Ariz. 1994) (specific educational provisions of Arizona Constitution rather than more general privileges and immunities provision applied). The Colorado Supreme Court's analysis also implicitly conflicts with these precedents.

the public health, safety or welfare." *Doherty v. City of Chicago*, 75 F.3d 318, 324 (7th Cir. 1996). The First Circuit has recognized at least the possibility of a substantive due process claim in the land-use context. "[W]e have never announced a rule precluding district courts from finding substantive due process violations by land use planning officials in every conceivable case. Rather, "[o]ur cases make clear that a regulatory board does not transgress constitutional due process requirements merely by making decisions for erroneous reasons or by making demands which arguably exceed its authority under the relevant state statutes.' " *Licari v. Ferruzzi*, 22 F.3d 344, 349-50 (1st Cir. 1994) (quoting *Amsden v. Moran*, 904 F.2d 748, 757 (1st cir. 1990) *cert. denied*, 498 U.S. 1041 (1991)).

In addition, in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), this Court concluded the Fifth Amendment's Just Compensation Clause provided the proper standard for reviewing a challenge to the conditions placed upon property redevelopment by a zoning board. The Court specifically rejected the dissent's contention substantive due process provided the appropriate decisional matrix for determining the validity of the zoning board's actions. *Id.* at 2316 n.5. *Dolan* provides additional support for the conclusion the Colorado Supreme Court should have applied takings rather than substantive due process principles in analyzing this case.

In the instant case, a takings analysis is more appropriate than a substantive due process analysis for at least two reasons. First, the state compensation prong of the ripeness requirement applicable to takings cases may not apply in the same fashion under a substantive due process standard. This Court has held a takings claim is not ripe for federal court consideration until the aggrieved property owner has resorted to any available state procedures and been denied just compensation. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson*

City, 473 U.S. 172, 194-97 (1985).[2] Colorado provides either a direct takings remedy based on Colo. Const. art II, § 15 on a trespass or conversion claim, neither of which the plaintiffs availed themselves of in this case. *State, Dept. of Health v. The Mill,* 809 P.2d 434, 439-40 (Colo. 1991); *Ossman v. Mountain States Telephone and Telegraph Co.,* 184 Colo. 360, 520 P.2d 738 (Colo. 1974). As a result, allowing the plaintiffs to state their claim in substantive due process terms bypasses *Williamson's* state compensation prong of the ripeness requirement. It is plainly inconsistent to require one plaintiff to exhaust his or her state remedies while allowing another to avoid this requirement simply because their respective claims are advanced under different constitutional theories. Here, the Colorado Supreme Court specifically refused to address the question of whether the plaintiffs' claim was ripe for review under the *Williamson* standard. *County of Adams v. Hibbard,* 918 P.2d 212, 216 (Colo. 1996). Second, the plaintiffs in this case allege a physical invasion and destruction of their property which would be a categorical taking under this Court's precedents. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1005 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 435-440 (1982). Analysis under these physical invasion takings precedents provides a much clearer standard for judicial consideration than the often murky terrain of substantive due process.

Finally, the Colorado Supreme Court applied substantive due process analysis in its decision despite the trial court and the Colorado Court of Appeals' recognition the plaintiffs had raised a takings claim in addition to, or instead of, their due process claim. Initially, the Colorado Supreme Court broadly framed the issue under consideration at the outset of its opinion.

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[2] In *Williamson,* this Court recognized that ripeness required both a final decision from the regulating agency and an attempt to obtain compensation through state proceedings for a § 1983 claim based upon a Just Compensation Clause violation. Without addressing whether the Due process Clause provided another applicable constitutional standard for the over regulation of private property, this Court found that the final decision prong of the ripeness requirement applied to such a theory. *Id.* at 195-197.

> The Supreme Court in *Monroe v. Pape,* 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961), held that 42 U.S.C. § 1983 (1988) must be 'read against the background . . . that makes a [person] responsible for the natural consequences of his [or her] actions.' Today, thirty years hence, we must decide whether a county or county officials must be held accountable under § 1983 for conduct that is designed to cause the outright destruction of a citizen's property. On the record before us, we conclude that the intentional misconduct of county officials causing the destruction of private property is a species of tort within the reach of § 1983 and we hold that government officials may be held personally accountable for the unauthorized and deliberate misbehavior under that Congressional enactment.

Hibbard, 918 P.2d at 213. In summarizing its holding the individual defendants could be held liable for their conduct, the Court stated, "Because the individual defendants knowingly and intentionally acted outside their authority under the ALJ order and deliberately deprived plaintiffs of their procedural and *substantive due process* rights by causing the arbitrary destruction of their private property, we hold them individually liable for their unwarranted conduct." *Id.* at 220 (emphasis added). The Court's general discussion contains no further distinct reference to the constitutional right or rights under consideration. In contrast, both the Colorado Court of Appeals and District Court of Adams County acknowledged that plaintiffs brought a takings claim under the Fifth Amendment.

First, in addressing the individual defendants' qualified immunity, the lower appellate court framed the issue as whether, "they reasonably should have known that a county's destruction of private property under the circumstances would constitute a 'taking' of plaintiffs' property without compensation or due process of law." *Hibbard v. County of Adams,* 900 P.2d 1254, 1263

(Colo. App. 1994). In continuing its discussion, the court concluded, "as attorneys for the County, the individual defendants were charged with the knowledge that a county's deliberate destruction of private property, if not lawfully authorized, constitutes a taking of property without compensation and without due process of law." *Adams, supra,* at 1264. Second, the district court specifically analyzed the plaintiffs' claims as a taking. The court concluded, "the destruction of this [garage/shop] building was not authorized by the administrative law judge's order and that the County's actions constituted a taking for which Plaintiff Hibbard is legally entitled to be compensated." *Hibbard v. County of Adams,* No. 89CV2876, slip. op. at 3 (D. Ct. Adams County Apr. 14, 1992). Similarly, "[a]s to Plaintiff Garrison, since his property was in the building improperly razed by the County, the Court finds and concludes that there was also a taking of his property and that he is entitled to compensation therefor." *Id.* at 4. The district court simply did not treat the plaintiffs' claim as implicating substantive due process concerns. No language in the district court's Order supports any interpretation other than the court thought it had a takings claim before it.

In conclusion, the Colorado Supreme Court applied the wrong legal standard in this case by analyzing the plaintiffs' claims in substantive due process rather than takings terms. This Court should review this erroneous decision to establish the appropriate constitutional standard for analyzing challenges to land-use and zoning regulations under § 1983. As this petition describes, the lower federal courts, and the state courts have reached vastly contradictory determinations concerning whether substantive due process or takings principles or both are applicable. The problem is particularly acute in Colorado because the Tenth Circuit's and the Colorado Supreme Court's analyses diverge sharply, meaning cases heard in federal and state court in Colorado could likely result in disparate outcomes raising the distinct possibility of wholesale forum shopping since § 1983 cases may be pursued in either federal or state court. No doubt before long other jurisdictions will face analogous dilemmas. This Court's review of the Colorado Supreme Court's decision

would provide needed consistency to this increasingly important area of the law.

In addition to establishing a consistent standard, other distinct reasons support this Court's accepting review. First, a "takings" analysis provides a concrete standard in contrast to the amorphous standards and precedents in the area of substantive due process. Second, the identical policy considerations underlying *Williamson* and its progeny support applying the ripeness requirement to challenges to land-use and zoning ordinances regardless of what constitutional provision a plaintiff chooses to frame her claim around. Third, the facts of this case lend themselves to a takings analysis since they present a categorical taking. For all the above reasons, the defendants ask this Court to review the Colorado Supreme Court's misapplication of substantive due process principles in the instant case.

II. THE COLORADO SUPREME COURT ERRED IN REACHING AND RESOLVING THE MERITS OF THE PLAINTIFFS' PROCEDURAL DUE PROCESS CLAIM.

The Colorado Supreme Court erred in reaching and resolving the merits of the plaintiffs' claim the individual defendants' actions violated their procedural due process rights for two reasons. First, the Court should have analyzed the plaintiffs' claim under the Just Compensation Clause of the Fifth Amendment. Second, the post-deprivation procedures and remedies available under Colorado law satisfied procedural due process.

A. THE COLORADO SUPREME COURT ERRED IN APPLYING PROCEDURAL DUE PROCESS ANALYSIS INSTEAD OF THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT.

As argued above, the plaintiffs' procedural due process claim, like their substantive due process claim, is also precluded by the explicit textual source provided by the Just Compensation Clause of the Fifth Amendment.

B. PROCEDURAL DUE PROCESS WAS SATISFIED BY THE POST-DEPRIVATION PROCEDURES AVAILABLE UNDER COLORADO LAW.

In analyzing whether the plaintiffs' procedural due process rights were violated, the Colorado Supreme Court failed to consider *Parratt v. Taylor,* 451 U.S. 527 (1981) and its progeny. Thus, the Court never addressed the threshold question whether any of the available procedures under Colorado law satisfied due process. The Court's omission was error. This Court should review this issue to clarify the operation of the *Parratt* doctrine in land-use regulation and takings cases.

The plaintiffs allege the activities of the individual defendants deprived them of their property without due process of law. The Colorado Supreme Court analyzed the plaintiffs' claim as, at least in part, alleging an infringement of their procedural due process rights. The Court described the defendants' conduct as implicating both the plaintiffs "*procedural* and substantive due process rights." *Hibbard*, 918 P.2d at 220 (emphasis added). The Court's analysis indicates it considered whether the defendants' actions violated both the procedural and substantive components of the Due Process Clause of the Fourteenth Amendment.

In similar fashion to its analysis under substantive due process, the Colorado Supreme Court neglected an important step in addressing the plaintiffs' procedural due process claim. Namely, the availability and adequacy of the State's postdeprivation procedures. In a series of cases beginning with *Parratt*, the Court has outlined the rule that a deprivation of property based on the random and unauthorized actions of a state employee does not violate the procedural protections of the Due Process Clause if an adequate and meaningful postdeprivation remedy for the loss of property exists. *Zinermon v. Burch*, 494 U.S. 113, 129-30 (1990); *Hudson v. Palmer*, 468 U.S. 517, 531-33 (1984); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 435 (1982); *Parratt,* 451 U.S. at 541-42.

Initially, in *Parratt*, the Court considered whether the negligent loss of a Nebraska prisoner's hobby kit by prison officials constituted a violation of due process. *Id.* at 529. In concluding the state's tort remedies provided an adequate procedural mechanism for the prisoner to seek redress for his property deprivation, the Court reasoned:

> The justifications which we have found sufficient to uphold takings of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act of a state employee. In such a case, the loss is not the result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place.

Id. at 541. Next, in *Logan*, the Court examined the contention *Parratt* applied to the Illinois Fair Employment Practices Commission's failure to hold a required conference within the requisite 120-day time period. *Logan*, 455 U.S. at 435-36. The Court concluded the rule was inapplicable because the injury in this case was the result of an established state procedure rather than a random and unauthorized act by a maverick state employee. *Id.* "Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference . . . *Parratt* was not designed to reach such a situation." *Logan*, 455 U.S. at 436.

Subsequently, in *Hudson* the Court again addressed the scope of the *Parratt* doctrine. There, a Virginia prisoner claimed a guard intentionally destroyed his property while searching his cell. *Hudson*, 468 U.S. at 520. The Court expanded *Parratt* to apply to intentional conduct in concluding the Commonwealth's postdeprivation procedures satisfied due process. *Id.* at 536. The Court explained:

> The underlying rationale of *Parratt* is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply "impracticable" since the state cannot know when such deprivations will occur. We can discern no logical distinction between negligent and intentional deprivations of property insofar as the "practicability" of affording predeprivation process is concerned. The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct.

Id. at 533. Finally, in *Zinermon,* the Court addressed the constitutional adequacy of Florida's voluntary commitment procedures to ensure patients were not erroneously committed to state mental health institutions without their informed consent. *Zinermon,* 494 U.S. at 114. The Court held hospital officials could not "escape § 1983 liability by characterizing their conduct as a 'random, unauthorized' violation of Florida law which the state was not in a position to predict or avert, so that all the process Burch could possibly be due is a postdeprivation damages remedy." *Id.* at 138. In so holding, *Parratt* was distinguished on the grounds the hospital officials' responsibility to determine a patient's competence to voluntarily commit himself was predictable, predeprivation procedures were available, and the officials' conduct was not outside the scope of their authority. *Id.* at 136-39.

To date, this Court has not applied *Parratt* in the present context of the ultra vires application of a land-use regulation and administrative order by county officials. However, in discussing the ripeness doctrine in *Williamson,* the Court noted the analogy between it and *Parratt.* Both doctrines arise from the Court's understanding the plaintiff's injury is not complete until the state has denied her an adequate postdeprivation remedy in procedural due process cases, or just compensation under takings analysis. *Williamson,* 473 U.S. at 195 and n.14.

The Colorado Supreme Court's refusal to consider *Parratt* flies directly in the face of several Circuit Courts of Appeal decisions. In *Yates v. Jamison,* 782 F.2d 1182 (4th Cir. 1986), the Fourth Circuit held that homeowner's procedural due process claims for a municipality's demolition of a residence without notification should be dismissed under *Parratt.* The Fourth Circuit found that the demolition occurred in violation of the municipality's notification and hearing proceedings. Since the demolition was unauthorized, the court found that the plaintiffs' due process rights had not been violated as plaintiffs could pursue a state inverse condemnation action as an adequate post-deprivation remedy. *Id.* at 1185. Additionally, other Circuit Courts of Appeal have applied *Parratt* in a land-use or takings dispute. *See Cathey v. Guenther,* 47 F.3d 162, 164 (5th Cir. 1995) ("Some takings, however, cannot fairly be attributed to the state because they represent the random and unauthorized actions of state actors."); *Licari v. Ferruzzi,* 22 F.3d 344, 348 (1st Cir. 1994) ("There is a further reason why the revocation of the building permits did not violate Colonial's right to procedural due process: postdeprivation remedies were available.").

The instant situation falls squarely within the scope of the *Parratt* doctrine. The Court's cases have identified three factors to judge whether the availability of postdeprivation procedures satisfies due process: (1) the predictability of the state actor's conduct; (2) the possibility of predeprivation process to prevent the deprivation; and (3) whether the state actor's conduct was unauthorized. *Zinermon,* 494 U.S. at 136-38; *Parratt,* 451 U.S. at 541-42. *Yates,* 782 F.2d at 1185. The individual defendants' conduct in destroying the plaintiffs' property satisfies all three of these requirements.

First, the County could not predict the individual defendants' actions. The County had no way of knowing the County Attorney and his assistant would order the razing of a building outside the scope of the ALJ's order leading to the complete destruction of the plaintiffs' property or the procedures required by Ordinance 3. The Colorado Supreme Court specifically concluded the damage to the plaintiffs' property was not a result of County policy, the individual defendants had no discretion in applying the blight removal ordinance, and they were not policy makers for the purposes of municipal liability under § 1983. *Hibbard*, 918 P.2d at 217-18. Under these circumstances, this case presents the identical situation as the prisoner guard's random and unauthorized intentional deprivation of the prisoner's property in *Hudson*. 468 U.S. at 533. The County could not "anticipate and control in advance the random and unauthorized intentional conduct of its employees" in bypassing proper state procedures to order the razing of a building outside the scope of the ALJ's order. *Id.* at 533.

Second, no predeprivation procedures could have prevented the deprivation of the plaintiffs' property. The availability of preventative predeprivation procedures is linked to the ability of the County to predict when a deprivation is likely to occur. Here, the individual defendant's actions in ordering the razing of the additional building outside the scope of the authority provided by the ALJ's order was completely unpredictable. Accordingly, "predeprivation procedures are simply 'impracticable' since the [County] cannot know when such deprivations will occur." *Id.* at 533.

Third, the individual defendants' actions were clearly not authorized by the County. The Colorado Supreme Court specifically concluded the County Attorney and his assistant acted outside the scope of the ALJ's order. *Hibbard*, 918 P.2d at 217-18. As such, their actions are not attributable to the County, and do not constitute municipal policy. Unlike the situation in *Logan*, the deprivation of the plaintiffs' property occurred not because of an established County procedure, but was due to the random

and unauthorized actions of the individual defendants. *Compare Logan*, 455 U.S. at 435-36.

In sum, the *Parratt* doctrine was specifically designed for situations like this one. The individual defendants' actions leading to the destruction of the plaintiffs' property constitute a random and unauthorized act which the County had no ability to either predict or prevent with the addition of any predeprivation procedures.

Finally, the plaintiffs had several options for possible postdeprivation remedies under Colorado law. First, the plaintiffs could have sought just compensation for the taking of their property as a direct action based on Colo. Const. art II, § 15. *The Mill*, 809 P.2d at 439-40. Second, plaintiffs could have filed a tort claim against the individual defendants in their individual capacities. For example, the plaintiffs had at least a colorable claim under either a conversion or trespass theory. *Ossman*, 520 P.2d at 741. The availability of these post-deprivation remedies for the plaintiffs to seek redress against both the County and the individual defendants for their deprivation of property was sufficient to satisfy due process under the *Parratt* doctrine. The Colorado Supreme Court's decision improperly expands the applicability of a procedural due process claim and transforms the *Parratt* doctrine into a nullity.

In conclusion, the Colorado Supreme Court failed to apply the correct legal analysis in considering the plaintiffs' procedural due process claim. This Court should review this failure to establish the operation of the *Parratt* doctrine in the context of procedural due process challenges to land-use and zoning regulations brought under § 1983. *Parratt* provides an important limitation on government liability for the random and unauthorized actions by government employees. The facts of the instant case provide another opportunity for this Court to further elaborate on the proper scope of the doctrine in an important area of the law while correcting the Colorado Supreme Court's error. For all the

above reasons, the defendants ask this Court to review the Colorado Supreme Court's misapplication of procedural due process principles in this instant case.

CONCLUSION

This case presents a unique and long awaited opportunity for this Court to define the role of substantive and procedural due process in the land-use context and to mandate that under the circumstances of this case a plaintiff must first attempt to obtain compensation through state remedies before utilizing 42 U.S.C. § 1983. The Colorado Supreme Court's decision, if left undisturbed, creates a general catch-all remedy without particularized standards for allegedly wrongful conduct by public officials through substantive due process. The application of that theory in the land-use context has created a split in the lower courts that should be resolved by this Court. Finally, the expansion of both substantive and procedural due process by the Colorado Supreme Court improperly allows litigants to create federal civil rights claims which should properly be resolved by existing state common law remedies.

Dated this 13 day of September, 1996.

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CERTIFICATE OF MAILING

I hereby certify that on this 13 day of September 1996, a true and correct copy of the foregoing ***PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO*** was mailed by placing the same in the United States Mail, postage prepaid, addressed as follows:

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